No. 83-2157 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1983

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CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN: DOROTHY GRAF; JAMES HURLEY and HELENE HURLEY; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

-against-

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York Court of Appeals

MOTION OF APPELLEES JONATHAN POOL AND BERNARD GROFMAN TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

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IN THE
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CRANE NECK ASSOCIATION, et al.,

Appellants,

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NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

On Appeal from the New York
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MOTION OF APPELLEES JONATHAN POOL AND BERNARD GROFMAN TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

Appellees Jonathan Pool and Bernard Grofman move this Court to dismiss Appellants' appeal. In the alternative, appellees Pool and Grofman move this Court to affirm the judgment rendered February 23, 1984 by the New

York Court of Appeals, on which this appeal rests. The basis for this motion is that there has been no final judgment rendered by the New York Court of Appeals; therefore, the necessary predicate for jurisdiction by appeal or certiorari under 28 U.S.C. § 1257 is lacking. This Court also lacks jurisdiction because the judgment of the New York Court of Appeals rests on adequate and independent state common law grounds. In the alternative, this Court should affirm the judgment sought to be reviewed because the determination of the federal question by the New York Court of Appeals was correct.

The opinion of the New York Court of Appeals is reported at 61 N.Y. 2d 154, 460 N.E. 2d 1336, 472 N.Y.S. 2d 901 (1984) and is reprinted in the

Jurisdictional Statement at 26a-41a. The opinion of the New York Supreme Court, Appellate Division, Second Department is reported at 92 AD 2d 119, 460 N.Y.S. 2d 69 (2d Dept. 1983) and is reprinted in the Jurisdictional Statement at 11a-25a. The unreported decision of the New York Supreme Court, Suffolk County, is reprinted in the Jurisdictional Statement at 1a-10a.

The motions filed by the other two appellees, the NYC/Long Island County Services Group and the New York State Office of Mental Retardation and Developmental Disabilities, have fully set forth the facts relevant to this appeal and they need not be restated in detail here.

FACTS

In brief, appellants are landowners in Crane Neck, New York who sued for an injunction and damages for violation by appellees Pool and Grofman of a restrictive covenant in their deed limiting use to single family dwellings. Pool and Grofman had leased their house in Crane Neck to an agency of New York State to be used as a community residence for eight profoundly retarded adults. Under MHL §41.34, the state agency chose the site after local government officials were notified and their views considered. The local government sought and obtained a due process hearing after which the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities upheld the site selection, finding that the community residence

would not substantially alter the nature and character of the area, which is the standard set forth in § 41.34 (c)(5). The state court affirmed the decision of the Commissioner. Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906, 441 N.Y.S. 2d 418 (2d Dept. 1981).

Appellants also sued, and the trial court granted them partial summary judgment by issuing a declaration that the covenant had been violated. However, the trial court declined to issue an injunction because other issues remained to be decided. On further appeal, the Appellate Division reversed, holding that a community residence would not be inconsistent with the terms of the covenant, and that state public policy would otherwise prohibit its specific enforcement. The New York Court of Appeals affirmed, holding that the

community residence was not a use contemplated by the covenant, but that specific performance of the restrictive covenants should not be awarded because the covenant violated state public policy in favor of deinstitutionalization of the mentally retarded. The Court of Appeals opinion also stated that the Contract Clause of the United States Constitution, art. I, sec. 10, cl. 1, had not been violated by the denial of the injunction.

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION, EITHER ON APPEAL OR CERTIORARI, BECAUSE NO FINAL JUDGMENT HAS BEEN RENDERED BY THE NEW YORK COURTS

Absent a final judgment by the New York courts, this Court has no jurisdiction, by appeal or certiorari. 28 U.S.C. § 1257. The New York courts have merely held that appellants are not

entitled to injunctive relief to enforce the restrictive covenants against appellees; they have not fully adjudicated appellants' claims for relief. An order by the New York Court of Appeals pursuant to N.Y. Civil Practice Law & Rules, § 5524, has directed that this action be remitted to the Supreme Court, Suffolk County, "there to be proceeded upon according to law." Jurisdictional Statement, 42a.

A. There Are Additional Issues Awaiting Adjudication

This action has been returned to the trial court, in contemplation of possible further proceedings, because of the limited consideration thus far given to the issues appellants raised in their complaint. The amended complaint herein

alleges seven causes of action, all relating to the alleged breach of the restrictive covenants prohibiting use of the Pool-Grofman premises for any purpose other than a single family dwelling. However, only three of these issues have been considered at all by the New York courts: the first two causes of action, which seek injunctive relief against the alleged breach of the restrictive covenants, and the seventh cause of action, which alleges a violation of the Contract Clause, Art. I, Section 10, cl. 1 of the United States Constitution.

Appellants' third and fourth causes of action are specific damages claims. The third is against appellees Pool and Grofman, and seeks exemplary damages of $50,000 for reckless disregard of the restrictive covenants plus any

profit realized by the lease of the property to the NYC/Long Island County Services Group and the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") ("State appellees"). The fourth is against the State appellees and seeks $50,000 exemplary damages for inducing a breach of the restrictive covenants by Pool and Grofman. The fifth and sixth causes of action allege that the State appellees have taken appellants' property without just compensation, in violation of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Because the proceeding that reached the New York Court of Appeals, and that is now before this Court, was an

interlocutory appeal arising from a motion by appellants for summary judgment, neither appellants' specific damages claims nor their "taking" and "just compensation" claims ever were considered by the New York courts. The trial court issued a memorandum decision, Jurisdictional Statement, 1a-10a which in effect was a declaratory judgment that the use of the Pool-Grofman premises for a community residence was not consistent with the restrictive covenants. However, the trial court did not award appellants any relief, finding that

> there still exist questions of fact that can only be resolved after further discovery and a trial concerning whether the plaintiffs have waived their rights under the covenant by violating the covenant themselves or whether they should be estopped

> from enforcing the restrictive covenant due to laches or previous acquiescence in violations thereof. There is also a defense raised that the character of the neighborhood has so changed as to defeat the object and purposes for which the restrictions are imposed.

Jurisdictional Statement, 9a-10a.

No trial on these issues has ever occurred. Instead, appellees sought an immediate interlocutory appeal to the Appellate Division, see N.Y. Civil Practice Law & Rules, § 5701, which reversed the trial court and declared there had been no violation of the restrictive covenants. The Appellate Division, on the grounds of New York public policy, also dismissed the complaint "insofar as it seeks injunctive relief." Jurisdictional Statement, 25a.

On further appeal by appellants, the New York Court of Appeals affirmed the Appellate Division order denying injunctive relief, although on different grounds. The Court of Appeals found that the covenants had been violated but that "[s]ince public policy prohibits enforcement of the restrictive covenants against the community residence at 3 Johns Hollow Road, appellants' action seeking to enjoin such use was properly dismissed." Jurisdictional Statement, 41a. Thus the opinion of the Court of Appeals made clear that the decision related solely to injunctive relief.

This record in this action makes clear how far this proceeding is from a final judgment. If appellants continue to pursue this action

(1) the trial must determine

whether appellants have waived their rights, if any, under the restrictive covenants by their own violation thereof.

(2) the trial court must determine whether appellants have previously acquiesced in the violations of the restrictive covenants.

(3) the trial court must determine whether the Crane Neck neighborhood has changed in character to the extent that the restrictive covenants' objects and purposes are no longer enforceable, a defense to the action granted by New York law. N.Y. Real Prop. Acts. § 1951.

(4) the trial court must determine whether a "taking" of property has occurred, and if so, the amount of compensation to be awarded.

B. This Case Does Not Fall Into The Special Categories Where This Court has Reviewed State Court Decisions Lacking Complete Finality

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court summarized four categories of cases "in which the Court has treated the decision of the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." Id. at 477. But this Court

expressly noted that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date...." Id.

This action presents the precise circumstances identified in Cox where interlocutory appellate review is inappropriate. A decision by this Court on the federal issue decided by the New York Court of Appeals, the Contract Clause issue, would leave unresolved the other federal claim of plaintiffs, the issue of whether there has been a taking of plaintiffs' property without just compensation.

"[F]urther proceedings are necessary to resolve the federal question whether there has been a taking at all.

The [State] court's decision, therefore, is not final, and [this Court is] without jurisdiction to review it." San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 633 (1980). Moreover, consideration of the taking issue alone, absent a further determination of the compensation that is constitutionally due, will not yield a final judgment. Id. quoting North Dakota Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 163 (1973). See also Cox Broadcasting Corp., supra, 420 U.S. at 477 n.6.

This Court also noted in Cox that the four special categories apply where "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'." Id. at 477-78. However, none of the exceptions per-

mitting immediate review is present here. Even if this Court reversed on the Contract Clause issue, appellants would not gain any immediate relief. As outlined above, several other issues still have to be litigated before appellants' entitlement to any relief can be established.

As to the four categories themselves, none is applicable herein. The first category is based on 'practical finality', i.e. that the decision on the federal claim is as a practical matter conclusive of the case because the party asserting the claim has no other grounds upon which to rest his case. Id. at 479. This exception has been reserved for cases in which a single federal issue has been raised, see e.g., Mills v. Alabama,

384 U.S. 214 (1966); cf Minnick v. Calif. Dep't of Corrections, 452 U.S. 105 (1981), and where the remaining procedures would be "mere formal gestures." Mills v. Alabama, supra, 384 U.S. at 217. This exception is inapplicable because, as already noted, there are other federal questions -- most notably the taking and just compensation issues -- that remain and can only be decided after a full trial.

The second category involves cases where "[t]he federal issue finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Cox Broadcasting Corp., supra, 420 U.S. at 480. This exception has been applied where "[n]othing that could happen [in the subsequent state-court proceedings] would

foreclose or make unnecessary decision on the federal question." Id.; see e.g. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In this action, by contrast, the remaining issues not yet litigated present a number of opportunities for appellants to obtain relief sufficient to convince them to abandon their Contract Clause claim. Although appellees do not concede appellants' entitlement to such relief, if such a decision were obtained through the litigation process it would certainly remove their incentive to press the existing federal claim.[1]

1. See Note, "The Finality Rule for Supreme Court Review of State Court Orders," 91 Harv.L.Rev. 1004, 1006 (1978)("Indeed, postponing appellate consideration increases the possibility that challenged rulings will not be appealed because subsequent events at trial may remove the incentive for one or more parties to press for review.").

In the third category are cases in which if the party seeking review loses on the merits, "the governing state law would not permit him again to present his federal claims for review." Cox Broadcasting Corp. supra, 420 U.S. at 481. Appellants have not cited any New York law which would preclude them from reasserting their Contract Clause claim so as to preserve it for review by this Court and counsel for appellees' Pool and Grofman do not know of any such barrier. Moreover, after a trial, the completed case "can be submitted for review within the context of a developed factual record [with] the articulated reasoning and legal conclusions of the trial judge." Note, supra, 91 Harv. L. Rev. at 1006; see also Minnick. v. Calif. Dep't. of Corrections, supra, 452 U.S. at 120.

The fourth category of cases applies where

> the party seeking review might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the State court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings yet to come.

Cox Broadcasting Corp., supra, 420 U.S. at 482-83.

In addition, this category applies only to cases where "a refusal to immediately review the state-court decision might seriously erode federal policy." Id.

This exception is in applicable because appellants do not seek to preclude a possibly unnecessary state court trial cf. id. at 482-484. On the contrary, they seek to permit further litigation of their claims for strict enforcement of the covenants.[2] Moreover no important federal policy will be eroded if interlocutory appellate review is denied. Appellants have no federal constitutional right to an injunction

2. In addition, a reversal by this Court will not automatically entitle appellants to an injunction prohibiting further use of the Pool-Grofman premises as a community residence. Thus, a reversal of the Contract Clause issue will not place this action within the first Cox exception. See text supra at 17-18. Rather, the trial court already has identified the substantial barriers appellants must overcome before such relief could be awarded. Jurisdictional statement, 9a-10a.

strictly enforcing their covenant. Appellants also never moved for any immediate relief on the theory that they would suffer irreparable harm by a delay. cf., National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) (per curiam). Indeed, the findings of the trial court, Jurisdictional Statement, 9a-10a, belie any suggestion that denial of immediate review would cause appellants any special harm. (See also Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906, 441 N.Y.S. 2d 418 (2d Dept. 1981), discussed infra at __.)

This case does not fall into any of the special categories enumerated in Cox Broadcasting Corp. As there is no final judgment, this Court lacks jurisdiction to review the decision of the New York Court of Appeals at this

time.

POINT II

THE DECISION BELOW RESTED ON GROUNDS OF PUBLIC POLICY AND NOT NECESSARILY ON ANY NEW YORK STATUTE. ACCORDINGLY, (1) THE DECISION INVOLVED NO "LEGISLATIVE IMPAIRMENT" AND DID NOT REQUIRE A DETERMINATION OF APPELLANTS' CONTRACT CLAUSE CLAIM; (2) THERE IS NO JURISDICTION HERE ON APPEAL AS THE DECISION BELOW DID NOT NECESSARILY DRAW INTO QUESTION THE VALIDITY OF A STATUTE OF THE STATE

The Judicial Code, 28 U.S.C. § 1257, provides for review in this Court of final judgments of claims under the federal constitution, treaties or statutes. Jurisdiction is absent, however, when the decision below rests on adequate and independent state court grounds and the opinion's discussion of federal questions was unnecessary. See Michigan v. Long, 103 S.Ct. 3469, 3474n.4 (1983). In this appeal, looking to the

"four corners of the decision" id. at 3475, the adequacy and independence of the state law ground on which this decision is based is clear, and the decision on the Contract Clause was unnecessary.

The decision of the New York Court of Appeals herein ultimately rested on its determination that the public policy of the state, and not any specific state statute, precludes injunctive enforcement of the restrictive covenants. The opinion of the Court of Appeals concludes by summarizing the holding as follows:

> Since public policy prohibits enforcement of the restrictive covenant against the "community residence" at 3 Johns Hollow Road, appellants' action seeking to enjoin such use was properly dismissed. (emphasis added.)

Jurisdictional Statement, 41a.

Similarly, the court began its discussion of the validity of the restrictive covenants by stating:

> But even if use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so would contravene a longstanding public policy favoring the establishment of such residences for the mentally retarded.

Id. at 31a-32a.

The opinion then continues with a lengthy discussion of executive, judicial and legislative acts which serve as indicia of the public policy and which effectuate that policy, concluding with the statement:

> Thus, the consistent, unequivocal legislative and executive pronouncements over the past 30 years leave no doubt that it is an important State policy

> to deinstitutionalize mentally and developmentally disabled individuals, and to teach them in "community residences" such as the one now maintained ... in Crane Neck.

Id. at 34a-35a.

The opinion of the Court of Appeals at one point speaks in terms that might be construed as directly applying Mental Hygiene Law, § 41.34 (f) to invalidate the restrictive covenants. The Court of Appeals stated:

> Given the avowed purpose of this law, we conclude that the Legislature did not enact subdivision (f) to erase the impediment resulting from single family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well.

Jurisdictional Statement, 37a.

However, in discussing the 1978 statute which added § 41.34 (f) to

Mental Hygiene Law, the Court of Appeals began by stating that "[t]he State policy was further reaffirmed by the passage in 1978 of what has come to be known as the 'Padavan Law'...." (emphasis added). Jurisdictional Statement, 33a.

Thus, the decision below rested on the public policy of the state and not on the Mental Hygiene Law itself. Hence, no determination of the constitutionality of that statute, as contrasted to judicially declared public policy, was necessary in the dispositio n of the appeal before the New York Court of Appeals. Accordingly, there is no issue with respect to the Contract Clause of the United States Constitution, because by its express terms and by judicial interpretation, the Contract Clause applies only to legislative impairments. Barrows v. Jackson,

346 U.S. 249, 260 (1953).

Although the New York Court of Appeals made reference in a footnote to the Contract Clause requirement of a Legislative impairment, Jurisdictional Statement, 40a n.5, it did not expressly decide whether a Legislative impairment had occurred.[3] Rather, the court concluded that the Contract Clause had not been violated because the public policy of the state favoring deinstitutionalization gives effect to important state policies in a manner reasonable and necessary to achieve those ends. Jurisdictional Statement, 40a-41a. This decision was a correct application of the

3. The court's very first sentence in its discussion of the Contract Clause refers to a refusal "to enjoin violation of the restrictive covenant on public policy grounds." Jurisdictional Statement, 39a.

decisions of this Court, see infra at 30-33, but it was unnecessary to a determination of the appeal absent a finding that a Legislative impairment existed.

In addition, since the decision rested on public policy grounds, there is no appealable order here. The decision below did not draw "in question the validity of a statute of a state" on federal grounds. 28 U.S.C. § 1257 (2).

POINT III

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL

This Court need not perform any Contract Clause analysis of Mental Hygiene Law, § 41.34. See text supra at 24-29. However, upon such review, appellants' claim of a violation of the

Contract Clause is so insubstantial that if this Court were to undertake review, it should summarily affirm.[4] Appellants have not suffered a substantial impairment of their contract. In addition, the New York community residence program implements important state and federal policies in a manner that is both reasonable and necessary to achieve those policy goals. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983).

A. There Has Been No Substantial Impairment of Appellants' Contractual Rights

At the time the Crane Neck

4. Appellants' attempt to raise a just compensation claim on this appeal is premature as this claim has not been adjudicated in the state courts. See text supra at 9-10.

restrictive covenants were created, New York had a longstanding policy of regulating land use and of refusing to enforce restrictive covenants when such enforcement would be inequitable. In a review of the restrictive covenants in the context of the Contract Clause, the expectations of appellants must be read to include the contemporaneous state law pertaining to both the subject matter of the covenant and to its enforcement. "This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement was reached." United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977); see also Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 37-8 (1940). In addition, a "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute

a substantial impairment." Energy Reserves Group, supra, 459 U.S. at 411.

This action involves a 1945 covenant restricting the use of land to single family dwellings. Jurisdictional Statement, 2a-3a. However, long before this covenant was written, the subject matter of this covenant, neighborhood land use control, had been held within the police power of the states generally, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and of New York in particular. Id. at 390 (citing Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). The authority to regulate land use had been exercised in New York by means of the state zoning enabling acts, first enacted in

1901.[5] The 1978 amendments to the Mental Hygiene Law establishing the site selection procedures for community residences for the developmentally disabled are but another example in a continuing process of legislative and judicial law-making concerning the use of land in New York State.[6]

The contractual expectations of appellants' predecessor in interest who created the covenants thirty-nine years ago must be read to have anticipated that over the years there would be further

5. See 1901 N.Y. Laws, Ch. 466; N.Y. Gen. City Law, § 20 et seq.; N.Y. Town Law, § 261 et seq.; N.Y. Village Law, § 7-700 et seq.

6. See e.g., N.Y. Envtl. Conserv. Law, § 16-0101 et seq. (flood control); N.Y. Gen. Mun. Law, § 96-a (historic sites preservation); N.Y. Parks & Rec. Law, § 14.01 et seq. (same); N.Y. Unconsol. Laws, § 6251 et seq. (urban development).

reasonable regulation of the use of the affected land. Otherwise, landowners could wholly negate state land use planning by use of restrictive covenants. This Court long ago stated:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making contracts about them. The contract will carry with it the infirmity of the subject matter.

Hudson Co. v. McCarter, 209 U.S. 349, 357 (1908), cited with approval in the Court's recent Contract Clause cases. See e.g., Exxon Corp. v. Eagerton, 103 S.Ct. 2296, 2305 (1983).

Further, appellants cannot claim any reasonable expectation that New York law would guarantee them specific performance for the breach or impairment of the restrictive covenants. At the

time the covenants were written, and for more than half a century before that date, New York law was clear and unambiguous: the state courts would not enforce restrictive covenants to protect interference of insubstantial value, particularly where enforcement would be inequitable. See e.g., Kew Gardens Corp. v. Ciro's Plaza, Inc., 261 A.D. 2d 576, 580, 26 N.Y.S. 2d 553 (2d Dept. 1941); McClure v. Leaycraft, 183 N.Y. 36, 41, 75 N.E. 961 (1905); Trustees of Columbia Coll. v. Thacher, 87 N.Y. 311, 316-17 (1882). In 1958, the state legislature enacted section 346 of the New York Real Property Law, 1958 N.Y. Laws, Ch. 864 (re-enacted in 1963 as N.Y. Real Property Actions & Proceedings Law, § 1951) to codify the doctrine expressed in these cases that restrictive covenants may be denied equitable enforcement. See generally

Orange & Rockland Util. v. Philwold Estates, Inc., 52 N.Y. 2d 253,264-5, 437 N.Y.S. 2d 291, 296, 418 N.E. 2d 1310 (1981); Commentary, 1958 N.Y. Laws, at 1188. The policy codified in this statute clearly demonstrates that appellants' predecessor in interest could not reasonably expect that equitable enforcement of the covenants would necessarily be granted in future years.

The very statute appellants attack, Mental Hygiene Law, § 41.34, provides appellants additional procedural safeguards not previously available under New York law. Before a community residence may be established, the sponsor must notify the municipality in which it will be located. Id., § 41.34(c). The local government can hold a public hearing, id., § 41.34(c)(2), and can then suggest alternate sites to the one

proposed for the community residence. If the alternate site is equivalent to the one proposed, the local government can compel the sponsor to open the residence at the alternate location. Id., § 41.34(c)(4). The local government can obtain a formal due process hearing before the Commissioner of OMRDD, id., § 41.34(c)(5), and judicial review of the Commissioner's decision is authorized. Id., § 41.34(d). Appellants, as the neighbors of the proposed community residence, obviously could participate in these procedures, including the judicial review of the Commissioner's decision.[7]

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7. See Grasmere Homeowners' Ass'n v. Introne, 84 A.D. 2d 778, 443 N.Y.S. 2d 956 (2d Dept. 1981)(community residence neighbors have standing to challenge Commissioner's decision under § 41.34(d)); Matter of Browe v. Champagne, 97 Misc. 2d 1058, 413 N.Y. S. 2d 103 (Sup. Ct. Rensselear Co. 1979)(same).

Most importantly, Mental Hygiene Law, § 41.34 also continues the substantive common law by providing that the Commissioner cannot approve a community residence site "if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of the establishment of the facility." Id., § 41.34(c)(5). This provision evidences a third reason why no substantial impairment of the covenant has occurred. Before this community residence was permitted to open, the local government requested a hearing and a decision of the Commissioner; his determination that the Crane Neck neighborhood would not be substantially altered was then appealed. The Appellate Division, Second Department affirmed. Incorporated Village of Old Field v. Introne, 81 A.D. 2d 906,

441 N.Y.S. 2d 418 (2d Dept. 1981). Thus, a New York court in a collateral proceeding under the Mental Hygiene Law has found no substantial damage to appellants. The cases cited in the per curiam decision of the Appellate Division, id.,[8] state that aside from conclusory allegations by residents and local officials, no proof was adduced that there would be any substantial alteration of the area, and that such conclusory statements are not sufficient to rebut the substantial evidence supporting the Commissioner's decision.

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8. Town of Hempstead v. Commissioner, 89 A.D. 2d 850, 851, 453 N.Y.S. 2d 32, 33 (2d Dept. 1982); Grasmere Homeowners' Ass'n v. Introne, supra, 84 A.D. 2d at 779, 443 N.Y.S. 2d at 957; Town of Hempstead v. Com'r, State of N.Y., 78 A.D. 2d 677, 678, 432 N.Y.S. 2d 399 (2d Dept. 1980); Town of Greenburgh v. Coughlin, 73 A.D. 2d 672, 423 N.Y.S. 2d 209 (2d Dept. 1979) mot for lv. to app. den. 49 N.Y. 2d 704, 427 N.Y.S. 2d 1025 (1980).

The lack of any substantial impairment is also clear from the very limited scope of the decisions by the state courts herein not to enforce the restrictive covenant. The decision below applies only to the establishment or operation of the one community residence in question. In every other respect the covenants stand, and all use of the properties covered by them remain limited to single family dwellings. The properties may not be used for commercial purposes, for multiple family dwellings or for institutions. As a result, it is clear that there has been no substantial impairment of appellants' contractual rights.

B. The State Courts' Refusal to Enforce the Restrictive Covenants to Prohibit Even A Single Community Residence

for the Developmentally Disabled Gives Effect to Important State and Federal Policies for Deinstitutionalization in a Manner that is both Reasonable and Necessary to Achieve those Policy Goals

The need for New York State to expand upon its 30 year effort of deinstitutionalization and community placement for the developmentally disabled, on which Mental Hygiene Law, § 41.34 is based, see Jurisdictional Statement, 32a-35a, is clearly a "significant and legitimate public policy" seeking to remedy "a broad and general social and economic problem" Energy Reserves Group, supra, 459 U.S. at 411-12. See also Jurisdictional Statement, 41a. The stat ute addresses the need to accommodate tens of thousands of developmentally disabled people who have been,

currently are, or in the next few years will be in need of community based residential placements.

Although New York has the largest community based residential placement program in the nation, the unmet demand for such placements has been and remains overwhelming. Of the estimated 119,000 to 300,000 New York residents who are developmentally disabled, there are approximately 5,000 in community residences and approximately 8,300 in other types of community based settings. N.Y.S. OMRDD, New York State Plan: Mental Retardation and Developmental Disabilities (1984-1987) 43, 188 [Feb. 1984]. In 1983, the total annual budget outlay for community based placements in New York was $ 23,633,000. Id. at 153.

Currently, however, fewer than

one half of the developmentally disabled persons who are in need of community residence places have them. Id. at 188. In the next decade, the gap between the demand for community placements and the available supply is expected to widen. In addition to the existing institutionalized population awaiting community placement, the state has identified approximately 15,000 substantially disabled persons living with their aging parents or siblings who will soon require community residence placements. Id. at 47-8. More than 5,000 others under age 21 who are currently in residential programs operated as part of the special education program in New York State, New York Education Law, §§ 4401 et seq., will require community based placements when their educational entitlement expires. New York State Plan (1984-1987), supra at 47-8. Because of the shortage of appropriate

residential settings or services, the legislature recently authorized funding for them to remain in their existing residential placements as a stop-gap measure. 1983 N.Y. Laws, Ch. 570. In total, by 1991, the demand for community based placements is expected to increase by 31 percent, far outdistancing the estimated growth in supply. New York State Plan (1984-1987), supra at 46, 55.

In addition, the importance attached by the legislature to expansion of New York's deinstitutionalization and community placement efforts is not appropriate for close judicial scrutiny. That legislative judgment is inextricably intertwined with professional judgments concerning the proper setting for the habilitation of the developmentally disabled. "It is not appropriate for courts to specify which of several professionally

acceptable choices should have been followed." Youngberg v. Romeo, 457 U.S. 307, 321 (1982)(quoting id., 644 F.2d 147 178 (3d Cir. 1980)(en banc)(Seitz, C.J. concurring)). The judgments reached by appropriate professionals, and by extension here, the legislative adoption of those judgments into the Mental Hygiene Law, are entitled to a presumption of correctness. Id. at 323.

The statute does not excuse the state from any of its own contractual obligations, cf. United States Trust Co., supra, and because fewer than one-seventh of all community residences in New York are state-operated, Janicki, Mayeda & Epple, "Availability of Group Homes for Persons with Mental Retardation in the United States," 21 Mental Retardation 45, 47 (1983), the statute is not designed to impair private contracts for the state's

advantage. As noted above at 37-39, the statute's main effect is to rationalize the process for community residence site selection; that it may incidentally affect appellants' alleged contract rights does not lessen its legitimacy. See Exxon Corp. v. Eagerton, supra, 103 S.Ct. at 2306.

The inescapable conclusion is that the public purposes underlying Mental Hygiene Law, § 41.34 are both significant and legitimate. Jurisdictional Statement, 41a. The state most clearly is exercising its police power to protect the health and welfare of its developmentally disabled citizens. Zubli v. Community Mainstreaming Associates, 102 Misc. 2d 320, 423 N.Y.S. 2d 982, 993 (Sup. Ct. Nassau Co. 1979) aff'd on opinion below 74 A.D. 2d 624, 425 N.Y.S. 2d 263 (2d Dept.) aff'd as modified 50 N.Y. 2d 1024, 431 N.Y.S.

2d 813, 410 N.E. 2d 746 (1980); Incorporated Village of Old Field v. Introne, 104 Misc. 2d 122, 127, 430 N.Y.S. 2d 192 (Sup. Ct. Suffolk Co. 1980). This interest is not less important than the Minnesota interest in protecting the economic interests of its older citizens, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), or the Kansas or Alabama interests in protecting their consumers of natural gas, see Energy Reserves Group, supra, 459 U.S. at 417; Exxon Corp. v. Eagerton, supra, 103 S.Ct. at 2306.

Equally clear is that any impairment of appellants' contract rights caused by Mental Hygiene Law, § 41.34 "[is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Energy Reserves Group, supra, 459 U.S. at 412 (quoting

United States Trust Co., supra, 459 U.S. at 22). Mental Hygiene Law, § 41.34 "strikes a delicate balance between the needs of the mentally disabled and the concerns of the community in which such residences will be located." New York State Senate Mental Hygiene and Addiction Control Committee, "Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation" ii [April 1979].[9] That balance is expressed in the site selection procedures which empower municipalities and homeowners to discuss and object to the site of proposed community residences. Mental Hygiene Law, §§ 41.34(b)-(d). The

9. This report, although prepared after enactment of Mental Hygiene Law, § 41.34, was cited approvingly by the New York Court of Appeals as an explanation of the legislature's intent. Jurisdictional Statement, 37a.

right to object -- which had not existed before the statute was enacted, Incorporated Village of Old Field v. Introne, supra, 104 Misc. 2d at 126, 430 N.Y.S. 2d at 195 -- ensures that no municipality or neighborhood will be burdened with an overconcentration of community residences. The statute explicitly prohibits community residences that would substantially alter the nature or character of the area. Mental Hygiene Law, § 41.34(c)(5).

If New York State is to carry out its deinstitutionalization program in an equitable manner, its legislature has concluded that the sponsor s of community residences for the developmentally disabled must have the power to override local zoning laws or restrictive covenants that otherwise would frustrate these efforts. See 1978 N.Y. Laws, Ch. 468,

§1.[10] The state legislature considered

10. The legislatures of 21 other states have reached similar public policy judgments in favor of community residential opportunities for the developmentally disabled. Running through all of these statutes are the same two themes that underlie Mental Hygiene Law, § 41.34: first, that the developmentally disabled and society as a whose will benefit from the creation of small, non-institutional living opportunities; and second, that these living opportunities cause no substantial impact in the neighborhoods in which they are located, and their establishment is a matter of statewide importance that must be given priority over local zoning ordinances and other exclusionary devices. Cal. Welf. & Inst. Code § 5115 (1972 & Supp. 1984); Colo. Rev. Stat. § 31-23-303(2) (1977); Hawaii Rev. Stat. § 333E- 3.5 (Supp. 1983); Ind. Code Ann. § 16-13-21-14 (Burns Supp. 1983); Me. Rev. Stat. Ann. tit. 30 § 4962-A (Supp. 1983-84); Md. Health Gen. Code Ann. § 7-102 (1982 & Supp. 1983); Mich. Comp. Laws Ann. § 125.216a (West Supp. 1984-85); Minn. Stat. Ann. §§ 245.812(3) (1982); 462.357(7) (Supp. 1984); Mont. Code Ann. §§ 53-20-101; 53-20-301 (1983); Neb. Rev. Stat. § 18-1745 (1983); Nev. Rev. Stat. § 278.021 (1983); N.J. Rev. Stat. Ann. § 40:55D - 66.1 (West 1984-85); N.C. Gen. Stat. §§ 168-20; 168-22; 168-23 (1982); Ohio Rev. Code Ann. § 5123.19(D) (Page 1981 & Supp. 1983); R.I. Gen. Laws

the general public support for the goals of community based programs for the developmentally disabled, see Site Selection of Community Residences, supra at 16,

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footnote 10 cont'd from preceding page:

§§ 45-24-22; 45-24-23 (1980 & Supp. 1983); S.C. Code Ann. § 44-21-20 (Law. Co-op 1976); Tenn. Code Ann. § 13-24-102 (1980); Vt. Stat. Ann. tit. 24 § 4409 (1979 & Supp. 1983-84); Va. Code § 15.1-486.2 (1981); Wis. Stat. Ann. § 62-63(i)(3) (West Supp. 1983-84).

In addition, the Arizona, California, Indiana, North Carolina and Wisconsin legislatures have explicitly stated that restrictive covenants will not be enforced to prohibit the establishment of community residences. Of these, only the Arizona and California legislatures were concerned with the retroactive application of their statutes. Ariz. Rev. Stat. § 36-582 (Supp. 1983-84); Cal. Health & Safety Code § 1566-5 (West Supp. 1984); Ind. Code § 16-13-21-14 (Burns Supp. 1983); N.C. Gen. Stat. § 168-23 (1982); Wis. Stat. Ann. § 62.23(i)(3) West Supp. 1983-84). But see Welsch v. Goswick, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982) (holding that the California statute and the state policy on which it rests evidences changed conditions to prevent equitable enforcement of a pre-existing restrictive covenant)

but recognized that some local governments and groups of private citizens will use zoning ordinances or restrictive covenants to resist efforts to place small community residences in their neighborhoods. Id.[11] The result, unacceptable to the New York State legislature, will be a shortageof community placements and a

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11. The legislative committee reported:

> General support for the community movement seems to erode, however, when the discussion moves away from a hypothetical question to the vacant building next door. Thus, the often heard paradoxical statement: "Yes, I support community residences for the mentally retarded, but not in my neighborhood."

Site Selection of Community Residences, supra at 16. See also Adams Cty. Ass'n for Retarded Citizens v. City of Westminster, 196 Col. 79, 580 P.2d 1246, 1250 (Sup. Ct. 1978) ("Clearly [the Colorado statute] was enacted ... to preclude municipalities from barring group homes from neighborhoods on the basis of fears and stereotypes about handicapped persons.")

concentration of community residences along "the path of least resistance:" i.e., in more tolerant areas or in areas in which the residents are poor or otherwise cannot mount expensive legal attacks to the site selected for a proposed community residence. Id. at 26, 27. The legislature especially wanted to prevent the "disproportionate distribution of community residences," 1978 N.Y. Laws, Ch. 468 § 1, which would yield "Mental Hygiene ghettos" in low income neighborhoods. Site Selection of Community Residences, supra at 27. Such a result is both inequitable and will defeat the beneficial purposes to be achieved by providing the developmentally disabled with the "least restrictive environment" that is consistent with their needs. 1978 N.Y. Laws, Ch. 468 § 1.

New York State has chosen to address

these competing interests in a manner that offers both substantive and procedural protections to residents of an area in which a community residence is proposed. By conditioning the establishment of a community residence on a finding that no substantial alteration of the area will occur, the state protects local residents and at the same time fosters the development and fair distribution of community residences throughout the state. Id.

CONCLUSION

For the foregoing reasons, the instant appeal should be dismissed for want of jurisdiction, or the judgment of

the New York Court of Appeals should be affirmed.

Dated: New York, New York
August 23, 1984

Respectfully submitted,

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